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No. 06-499

In the Supreme Court of the United States

STEVEN C. MORRISON,
PETITIONER,

v.

BOARD OF LAW EXAMINERS
OF NORTH CAROLINA, *ET AL.*,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Association of Corporate Counsel ("ACC") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief; respondents have not responded to our request for consent.

The ACC is a non-profit bar association of attorneys practicing in the legal departments of public, private, and not-for-profit corporations and other private-sector organizations. ACC promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. With more than 20,000 members employed by over 8,000 organizations in 55 countries, ACC represents attorneys in both large and small companies, including 98 of the Fortune 100 companies, and 74 of the Global 100 companies.

One of ACC's principal missions is to serve as the voice of the in-house bar. This occurs not only in connection with matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house counsel to their companies, but also on broader issues relating to the regulation of the legal profession generally, including how outside counsel to ACC members' clients perform their duties and are regulated. Accordingly, ACC consistently promotes standards that facilitate the effective and efficient practice of law and opposes standards that interfere with that objective, including state bar requirements that discriminate against or burden the efficient, coordinated, and seamless flow of corporate legal services across jurisdictional boundaries.

ACC's primary interest as *amicus curiae* in this case arises from the profound implications of the Fourth Circuit's decision on the ability of ACC's members to serve their clients and on their corporate employers' ability to receive effective and economical legal representation from outside and in-house counsel. Modern and sophisticated corporate clients must operate in an increasingly national, and often international, business climate in order to compete and flourish. It is imperative for the legal profession to grow with clients' needs, unhindered by outdated and unconstitutional practice barriers that artificially and unnecessarily preclude otherwise qualified and competent corporate lawyers from fully and readily serving the expanding geographical legal needs of their clients. These artificial practice barriers protect neither the public nor clients: rather, they merely create obstacles that significantly impede corporate clients' freedom to hire expert counsel of their choice or to relocate in-house legal staff with whom they have a longstanding and trusted professional relationship. Because the North Carolina reciprocity provisions at issue in this case unconstitutionally impair these objectives, ACC submits this brief in support of the petition for certiorari that seeks review of the Fourth Circuit's decision upholding those provisions.

Accordingly, the motion for leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The Association of Corporate Counsel ("ACC") is a non-profit bar association for attorneys practicing as in-house counsel in the legal departments of domestic and international public, private, and not-for-profit corporations and other private-sector organizations. The interest of ACC as *amicus curiae* is set forth in the accompanying motion for leave to file this brief.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

It is well established, and not contested in this case, that states have the constitutional authority to regulate the legal profession and the practice of law. This includes the admission of attorneys to the state bar. *See Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957). Furthermore, this Court has recognized that a lawyer admitted in one state does not have a constitutional right automatically to be allowed to practice in another state. *See Leis v. Flynt*, 439 U.S. 438, 443 (1979).

At the same time, it is equally well settled that a state "cannot exclude a person from the practice of law . . . for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware*, 353 U.S. at 238-39. Furthermore, although a state can set appropriate standards of legal competence and good character for admission to its bar, "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239. As Judge Craven previously explained for a three-judge district court with specific reference to the North Carolina bar, "[i]n licensing attorneys there is but one constitutionally permissible state objective; the assurance that the applicant is capable and fit to practice law." *Keenan v. Board of Law Examiners of North*

1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel for a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae*, its members, or counsel.

Carolina, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court). *See* Pet. 2 (North Carolina bar statutes and rules). Thus, the National Conference of Bar Examiners recognizes that "[s]tate standards of qualification . . . must have a rational connection with the applicant's fitness or capacity to practice law." National Conference of Bar Examiners, THE BAR EXAMINERS' HANDBOOK 20:103 (3d ed. 1991).

The reciprocity provisions adapted by the bar of North Carolina (and those of approximately 22 other states, *see* page 10, *infra*) squarely raise the issue of the constitutional limits on state requirements imposed for bar admission without examination. The North Carolina reciprocity requirements are arbitrary and irrational and serve as protectionist barriers that impede the ability of out-of-state lawyers to gain admittance in North Carolina.

In recent years, the practice of law unquestionably has become interstate (and international) in nature. This largely reflects the needs of clients in a national (and global) economy. State regulation of the legal profession, however, was born in another era, when businesses were largely local and lawyers were primarily engaged in practice before the courts of a single state. Because the practice of law has changed and the regulation of lawyers has not, the state licensing system has failed to keep up with this development. The reciprocity provisions imposed by North Carolina and 22 other states lead to arbitrary and irrational results for lawyers required to comply with the burdens of multistate practice regulation. This impedes the interstate practice of law and interstate movement of lawyers, but fails to serve the states' legitimate objective of ensuring the competence and fitness of the attorneys admitted to their bars.

The focus of state bar regulation increasingly has shifted from the legitimate ends of protecting the public toward the illegitimate ends of protecting local practitioners from competition from their peers who are qualified to practice but licensed in other states. It is not unusual, unfortunately, for state

bars to adopt various means to protect the interests of their locally admitted members. For example, they widely erected residency requirements, but this Court repeatedly invalidated those measures. North Carolina's reciprocity provisions represent the next generation of restrictive bar requirements, and petitioner's challenge to reciprocity requirements is the latest battle in this continuing war to free lawyers, their clients, and the Nation's economy from the parochial restraints of state bar organizations.

The question of the constitutionality of these reciprocity provisions warrants this Court's review. Such requirements are common among the states and present an issue of recurring importance. As the practice of law has become more national (and international) in nature and the mobility of lawyers has increased, state restraints on multi-jurisdictional practice have imposed ever-greater burdens on clients' choice of counsel, the expert practice of substantive law which is not limited by the boundaries of states and nations, and the inter-connected nature of our world economy. This has had particularly adverse effects on corporate lawyers and the corporate clients they represent. *See* Richard L. Abel, AMERICAN LAWYERS 124 (1989) ("easing of interstate mobility will be particularly important to house counsel"). The circumstances of this case fully illustrate these problems. Accordingly, the petition for a writ of certiorari should be granted. *See* National Conference of Bar Examiners at 20:103-04, 20:107 (recognizing that "much of the states' discretion in dealing with bar admissions has been eliminated by the cloaking of bar applicants with constitutional protections" and that reciprocity requirements "are ripe for challenge").

I. THE MODERN PRACTICE OF LAW HAS BECOME INHERENTLY INTERSTATE IN ORDER TO SERVE CLIENTS' NEEDS, AND NORTH CAROLINA'S RECIPROCITY PROVISIONS FAIL TO REFLECT THIS DEVELOPMENT OF THE LEGAL PROFESSION.

Our legal system, like the national (and international) economy, has undergone rapid and profound change in recent years. In particular, the practice of law has been largely transformed in the last few decades.

As Justice Stevens noted in his dissent in *Leis*, "the nature of law practice has undergone a metamorphosis." 439 U.S. at 449 (Stevens, J., dissenting). "Interstate law practice and multi-state law firms are now commonplace," and "'[m]ulti-state or interstate practice by attorneys in this country is an expanding phenomenon.'" *Id.* at 449 n.8 (citation omitted).

National bar organizations and academic commentators similarly have observed this fundamental change in the practice of law. A report of the American Bar Association Commission on Multijurisdictional Practice, noting "the changing nature of law practice," explains the "general consensus" that "cross-border legal practice" is "on the increase" and that "this trend is not only inevitable, but necessary." AMERICAN BAR ASSOCIATION, *Report of the Committee on Multijurisdictional Practice* (Aug. 2002) at 3, 10. *See also, e.g.*, Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 668 (1995).

This now-familiar development in the legal profession has been attributed to a number of factors. For example, clients large and small, from every industry, increasingly are involved in disputes or transactions that cross state lines and thus need multi-state legal services. Especially as law practice has become more specialized, corporate clients depend on lawyers who have expertise in a particular substantive area of law as it is applied

across jurisdictional lines; clients look to hire lawyers who can meet their needs wherever legal representation is required. While local counsel will always play a vital role, there is an increasingly great need for national and even international counsel. This, in turn, has been facilitated by a growing degree of uniformity in state law in a host of areas and the enhanced scope and applicability of federal law. Finally, the greater mobility of lawyers and the existence and prominence of large multi-state and even international law firms also play an important role in this development. *See, e.g. Frazier v. Heebe*, 482 U.S. 641, 648 n.7 (1987); *Leis*, 439 U.S. at 449 & nn.6, 8 (Stevens, J., dissenting); ABA Report at 3, 10-12; Wolfram at 668-69; Gerald J. Clark, *The Two Faces of Multijurisdictional Practice*, 29 N. KY. L. REV. 251, 263-64 (2002).

In assessing this development, it is critical to keep in mind the needs of the client and lawyers' paramount obligation to serve their clients. *See Leis*, 439 U.S. at 445 n.2 (Stevens, J., dissenting). Noting "our tradition of respect for client choice," the ABA Report explains that there is a "need for lawyers to cross state borders to afford clients competent representation" and that "[t]he existing system of lawyer regulation has costs for clients." ABA Report at 5, 10, 12. *See also* Deborah L. Rhode, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 154 (2000); Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 476 (1997); *see generally United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (discussing right to counsel of client's own choosing).

Unjustified restrictions on the multijurisdictional practice of law severely burden corporate clients in a variety of ways. *See, e.g.*, ABA Report at 10-12; Wolfram at 668-69. For example, in litigation or transactions that involve more than one state, as complex and even many routine legal issues do today, these restrictions require companies to have legal representation in multiple (sometimes all 50) states. In turn, this restricts their

ability to retain outside counsel of their choice who is expert in the area of law and who is familiar to the client but not licensed in every one of the states in question. It also impairs their ability to achieve coordinated and effective compliance with the law across the company as a whole. And it necessarily increases the cost of legal services to the client.

Similarly, such restrictions require companies to have in-house lawyers admitted in every jurisdiction where they operate or legal disputes arise. Thus, instead of one corporate attorney who is expert in the particular area of law, they need to have a multiplicity of lawyers, thereby interfering with efficient staffing and internal flexibility and again driving up legal costs.

Finally, these restrictions also undermine companies' ability to retain or hire lawyers by discouraging outside or in-house counsel from relocating to take new positions because of the significant deterrent posed by arbitrary admission rules and the prospect that an experienced lawyer would again have to take the bar exam (perhaps in multiple jurisdictions). This case graphically illustrates these concerns for corporations and for the legal profession.

Unfortunately, state bars have not, in general, kept up with the fundamental changes in the legal profession. Historically, "few restrictions on interstate law practice existed. . . . '[U]ntil the 1930s, lawyers admitted in one state encountered few impediments in practicing in another.'" Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 145 (2004), *quoting* Abel at 124.

With the Depression, however, "[s]tarting in the 1930s, state bars increasingly 'sought to protect their markets from out-of-state lawyers.'" *Id.* at 148, *quoting* Abel at 124. "One prominent legal ethicist, Professor Charles Wolfram, has captured the essence of what many commentators have found:

> '[T]he states [today] are by and large quite restrictive about admitting out of state lawyers. . . . The reasons

> given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state lawyers . . . by competition with out-of-state lawyers.'

Id. at 147, *quoting* Wolfram at 679. Thus, as this Court has noted, according to a former president of the American Bar Association, "'[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition.'" *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.18 (1985), *quoting* Chesterfield Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557 (1978). *See also, e.g.*, Perlman at 138, 147-50, 170, 178; Clark at 254, 265; Needham at 467, 475-76.

State bar regulation continues to amount to guild-like protectionism for local lawyers and fails to reflect the profound changes that have occurred in the legal profession and the multi-state practice of law. As the ABA Report succinctly summarizes: "Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution." ABA Report at 3. Instead of "catch[ing] up with the changing realities of the practice of law," the perpetuation of restraints on multi-jurisdictional practice embodies "semi-official professional mythology about the largely bygone world in which the bar's leadership appears to believe it continues to practice . . . [and in particular] the myth of the single-state practitioner." Wolfram at 670. These restraints on "interstate practice are both real and substantial, and they reflect poor state policy. . . . [Such limits] either must ignore the present realities and desirability of interstate dealings by clients or be rooted in concern for the competitive advantage of local lawyers that ill serves a vibrant national economy." *Id.* at 713. *See also* Rhode at 154 ("[s]uch reciprocity rules are difficult to justify from any consumer protection perspective"); Clark at 264-65. As a result, although "[l]awyers recognize that the geographic scope of a lawyer's

practice must be adequate to enable the lawyer to serve the needs of clients in a national and global economy," state bar rules "impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively." ABA Report at 3.

State bar protection has taken different forms over time. For example, residency requirements once were widely used to exclude out-of-state lawyers. In a series of decisions, this Court invalidated such restrictions. *See Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Piper*, *supra*; *see also Frazier v. Heebe*, *supra* (residency requirement for federal district-court bar was irrational and unnecessary to serve the purpose of attorney competence). In addition, in some instances out-of-state lawyers have been excluded by application of *pro hac vice* rules. *See*, *e.g.*, *Gonzalez-Lopez*, *supra*. *See also Maw v. Calogero*, *petition for cert. pending*, No. 05-1645 (filed June 23, 2006), and *Leclerc v. Webb*, *petition for cert. pending*, No. 06-11 (filed June 22, 2006), *orders inviting Solicitor General to file briefs* (Oct. 2, 2006).

The reciprocity provisions adopted by respondents (and the bars of 22 other states) are the latest manifestation of this same problem. Such requirements are arbitrary, irrational, unrelated to the protection of the public, and onerous to out-of-state lawyers and their clients. There can be no doubt about the significance of this issue to our legal system and to our economy in general. In *Piper*, this Court explained both that "the practice of law is important to the national economy" and that "the legal profession has a noncommercial role and duty" that underscore the broad public consequences of bar limitations.

Furthermore, such restraints are not self-correcting. "The history of bar reform suggests that necessary changes often occur only after significant litigation." Perlman at 178. This is hardly surprising; "[o]nce admitted to the bar, lawyers have little incentive to eliminate arbitrary or overbroad restrictions if the

effect would be to increase the number of potential competitors." Rhode at 154.

In the past, this Court has been vigilant to grant review to foreclose unconstitutional efforts by state bars to exclude out-of-state lawyers. It should be no less vigilant here.

II. THE NORTH CAROLINA RECIPROCITY PROVISIONS ARE IRRATIONAL AND BURDENSOME AND ARE UNNECESSARY TO THE STATE'S LEGITIMATE INTEREST IN ENSURING ATTORNEY COMPETENCE AND FITNESS.

The North Carolina reciprocity provisions consist of two parts. The first is the basic reciprocity requirement that North Carolina will admit to its bar without a required bar examination a lawyer licensed in another state if, but only if, that other state does the same for a North Carolina lawyer seeking admittance to its bar (the "place-of-admission requirement"). The second is the additional requirement that the lawyer must actively have practiced *in the reciprocity state* for at least four of the last six years preceding the application to be admitted to the North Carolina bar without examination (the "place-of-practice requirement").

ACC submits that both provisions are at issue here under the Fourth Circuit's decision. The court of appeals, while purporting to treat them as separate issues, in fact conflated them. Thus, while the court disclaimed deciding the constitutionality of the basic place-of-admission reciprocity requirement (Pet. App. 3 n.1), its stated rationale for expressly upholding the place-of-practice requirement was entirely and exactly that reciprocity itself is valid. *See id.* at 6-8. Accordingly, the decision below effectively passed upon both components of the North Carolina reciprocity provisions. In these circumstances, the antecedent place-of-admission requirement as well as the place-of-practice requirement that was explicitly sustained are properly before this Court.

A. States' Bar Admission Systems.

In 2005, of the 50 states and the District of Columbia, approximately 19 jurisdictions required that an attorney who seeks full-time or permanent admission to that state's bar, regardless of the applicant's prior practice or admission in another jurisdiction, take and pass that state's bar examination. *See generally* National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admission to the Bar, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 25-29 (2006) (not inclusive of recent 2006 changes to bar admission requirements).

The remaining jurisdictions provided for admission without examination (also known as "admission on motion," *see Freidman*, 487 U.S. at 61) to certain applicants who have previously been admitted to the bar of another state. Of these approximately 32 jurisdictions, some 13 states allowed attorneys who have previously been admitted to the bar of any other U.S. jurisdiction, and who have been practicing for a prescribed number of years, to apply for admission on motion without having to re-take a bar examination.

The remaining jurisdictions limited admission on motion to those candidates from jurisdictions that permit reciprocity of admission without examination for their lawyers. Of the approximately 23 reciprocity jurisdictions, some 14 states, including North Carolina, required that the applicant have engaged in the active practice of law for a specified number of years *in the state of reciprocity*. Under the laws of the other nine reciprocity states, the location of the applicant's practice need not have been in a reciprocity state.

B. The Design And Effect Of The North Carolina Reciprocity Provisions.

An understanding of the design and effect of the place-of-admission and place-of-practice requirements is crucial for the legal arguments that follow in Section III, *infra*.

1. *Place-of-admission requirement.* North Carolina affords reciprocity to lawyers admitted in *any* other state if, and only if, that state offers reciprocal advantages to North Carolina lawyers requesting admission without examination to its bar. If another state declines, for whatever reason, to enter into a reciprocal arrangement, North Carolina will not permit the other state's lawyers to be admitted on this basis; in thus excluding them, North Carolina does not make any determination of the other state's bar admission standards or the competence of its lawyers to practice in North Carolina. *See* Rhode at 154 ("[i]f experienced out-of-state attorneys are competent to practice, it shouldn't matter how their local bars treat competitors").

Conversely, North Carolina *automatically* allows reciprocity to another state simply upon the other state's grant of reciprocity to North Carolina. Again, North Carolina makes no attempt to determine the stringency of the other state's bar examination, or the competence of its lawyers, or the similarity of the laws of that state to those of North Carolina, or any other factor that would rationally support North Carolina's acceptance of the other state's bar exam and admission as an indication of the competence and character of the lawyer seeking admittance to the North Carolina bar. *See* Perlman at 150. In fact, respondents' website expressly disclaims even knowing at any given time which other states have reciprocity arrangements with North Carolina, directing the viewer to check with the bar authorities in the other states. *See* http://www.ncble.org (follow "comity" hyperlink).

Respondents have candidly acknowledged that the *sole* purpose of this reciprocity requirement is to entice other states to confer reciprocal benefits on North Carolina lawyers. *See* Pet. App. 39. Thus, the North Carolina reciprocity requirement was designed and adopted in order to benefit lawyers licensed in North Carolina, not to protect the public by ensuring the competence and fitness of lawyers seeking admission to the North Carolina bar without examination.

In view of the deficiencies and arbitrariness of state-by-state reciprocity arrangements such as North Carolina's, the ABA Commission on Multijurisdictional Practice recommends that admission without examination be extended to any lawyer who, *inter alia*, has been admitted to practice law in *any* other state, territory, or the District of Columbia for a specified period of time. *See* ABA Report at 47. As the Report elaborates, the recommended provision

> recognize[s] the reality that lawyers who have been admitted to another state's bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state and that, for experienced lawyers, the bar examination [which would be necessary absent reciprocal admission] . . . serves as an unnecessary obstacle to establishing a practice in the new state.

Id. at 48.[2]

2. *Place-of-practice requirement.* In addition to the basic place-of-admission reciprocity requirement, North Carolina also imposes a place-of-practice requirement that the applicant for admission without examination must have actively practiced for at least four of the last six years *in the reciprocity state*. In particular, it is not sufficient that an applicant have been licensed by and actively practicing law in a state for that period preceding his application; rather, he is required to have been engaged in the active practice of law in the specific state that is the basis for his requested admission without examination on the ground of reciprocity. By itself, this provision serves to exclude licensed and competent out-of-state lawyers from admission in North Carolina. *See* Wolfram at 682 ("[m]ost onerous for lawyers who frequently move from state to state is a requirement found in many on-motion states establishing a minimum number of years

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2. Respondent was admitted, by examination, in California, Indiana, and Ohio.

during which the out-of-state applicant must have practiced law in a single jurisdiction"); Needham at 503.

In its evident design and effect, the North Carolina place-of-practice requirement is highly arbitrary and irrational and does nothing to ensure competence and fitness to practice law. For example, there is no comparable requirement for a lawyer who long-ago passed the North Carolina bar exam to retain his eligibility to practice in North Carolina. Such a lawyer might not have practiced law at all for an extended period, or not done so in the six years preceding his application, or practiced for brief periods in various jurisdictions outside North Carolina, or moved away from North Carolina for many years (even to a non-reciprocity state such as California) and then returned to the state; yet, provided only that he satisfied the formal requirements to maintain his bar membership each year, he could resume practice at any point without any inquiry by respondents. *See* Perlman at 158.

Likewise, as petitioner's case demonstrates, this place-of-practice requirement can illogically divest applicants of eligibility for reciprocity admission that they previously established. Mr. Morrison passed the bar exams of, and practiced in, both Indiana and Ohio, which are reciprocity states with North Carolina. If he had applied for admission without examination at that time, he would have qualified. However, because he continued to practice law for approximately 15 years in California (where he also passed the bar exam, but which is not a reciprocity state) and for three years in North Carolina itself, he lost that eligibility. By contrast, a junior lawyer who was admitted and practiced in Indiana or Ohio for four years and then sought reciprocity admission in North Carolina would be accepted. *See* Perlman at 150. Indeed, if Mr. Morrison himself had moved back to Indiana or Ohio and practiced there for four years, he instantly would have regained his eligibility for reciprocity admission in North Carolina. In that circumstance, while his competence to practice law in the state would not have changed, the arbitrary factor of the location of his most

recent practice would determine his admission without examination to the North Carolina bar.

Finally, the North Carolina place-of-practice requirement is starkly protectionist. It does not ensure competence and fitness but simply restricts the out-of-state lawyers who can be admitted without examination in North Carolina and thus compete with in-state attorneys. *See* Pet. App. 7-8.

The ABA Commission on Multijurisdictional Practice avoids these inherent defects in the place-of-practice requirement imposed by North Carolina. It recommends that admission without examination be granted if the applicant practiced for the prescribed period in *any* state, territory, or the District of Columbia. ABA Report at 47.[3] The Commission explains that lawyers who have practiced for such "a significant period of time" in "another state's bar" are "qualified to establish a law practice in the new state." *Id.* at 48.

III. THE NORTH CAROLINA RECIPROCITY PROVISIONS VIOLATE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES AND THE COMMERCE CLAUSE.

Against this background, it is clear that the North Carolina place-of-admission and place-of-practice requirements violate the Equal Protection and Due Process Clauses and the Commerce Clause.

A. Due Process And Equal Protection.

Equal protection and due process are violated if the provision in question is arbitrary and irrational in relation to the legitimate governmental objective it is drawn to achieve. *See Schware*, 353 U.S. at 238-39 (to "exclude a person from the practice of law," "any [bar] qualification must have a rational connection with the applicant's fitness or capacity to practice law" in order to satisfy equal protection and due process);

3. The Commission recommended a period of practice of five of the preceding seven years.

see also, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 448 (1985); *Zobel v. Williams*, 457 U.S. 55, 60, 61, 65 (1982); *cf. Frazier v. Heebe*, 482 U.S. at 646, 649 (invalidating, under supervisory power, a district-court bar requirement as "unnecessary and irrational"); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (due process). Here, as a matter of law, the only legitimate state interest is to ensure the competence and fitness of reciprocity applicants to practice law. *See* pages 1-2, *supra.* Neither the place-of-admission requirement nor the place-of-practice requirement satisfies this constitutional standard.

1. *Place-of-admission requirement.* As explained above (*see* pages 11-12, *supra*), the basic place-of-admission reciprocity requirement does nothing to ensure competence and fitness to practice law. Rather, North Carolina *automatically* allows reciprocity for *any* other state that grants reciprocity to it. Thus, this requirement does not serve to test the competence of lawyers seeking admission on motion; North Carolina has effectively ceded control over its own bar to the other states with which it has reciprocity relationships. Respondents rejected petitioner's application for reciprocity simply because California, where he passed the bar exam and practiced for approximately 15 years, is not a reciprocity state with North Carolina — and it did so without any determination (or even inquiry) as to whether California's bar admission standards established the professional qualifications of California-admitted lawyers to practice in North Carolina. *See* Perlman at 147 (referring to "[t]he senselessness of rigid rules on interstate law practice"); Wolfram at 679 ("[t]he reasons given for the restrictions [on admitting out-of-state lawyers] are probably largely pious eyewash").

While, of course, "this Court is not well positioned to dictate specific legislative choices to the State, it is sufficient to note that . . . [other] alternatives exist." *Friedman*, 487 U.S. at 69; *see also Piper*, 470 U.S. at 285 n.19. Most obviously, North Carolina could — as 13 other states do and the ABA

Commission on Multijurisdictional Practice recommends — not limit its admission without examination to only some other (self-selected) states but extend it to attorneys admitted and in good standing in any other jurisdiction. Especially with respect to experienced practitioners like Mr. Morrison, that approach would be no less effective in ensuring the competence and fitness of the lawyers admitted and would avoid the arbitrariness and irrationality of North Carolina's current requirement.

Nor is it an answer that applicants could avoid the unconstitutional reciprocity requirement merely by taking the North Carolina bar exam. First, this Court already has rejected the identical argument, holding that such an alternative is "quite irrelevant" because it does not cure the arbitrariness and irrationality of the requirements and distinctions of the North Carolina system. *See Friedman*, 487 U.S. at 66-67. Second, obligating an experienced lawyer to take another bar exam is no "mere" matter. "A bar examination, as we know judicially and from our own experience, is not a casual or lighthearted exercise." *Id.* at 68. Furthermore, the bar exam, which is designed for new attorneys, is not a meaningful or accurate way to test the competence of an experienced lawyer to practice law and constitutes a needless barrier to admission in another state. *See* ABA Report at 48 ("for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state"); Needham at 456; Rhode at 150-52. Finally, it is cold comfort to require an experienced lawyer who has a national practice, or who works in or has moved among several states, to incur the significant expense and commit the substantial time to take bar exams in each and every one of the jurisdictions necessary to serve his needs and those of his clients. *See* ABA Report at 8, 48.

2. *Place-of-practice requirement.* Likewise, North Carolina's place-of-practice requirement bears no rational relationship to the legitimate state objective of attorney competence and fitness. Rather, as previously demonstrated (*see* pages 12-14, *supra*), it is completely arbitrary and irrational

and utterly fails to ensure that competent out-of-state attorneys are admitted and incompetent ones rejected.

Once again, possible alternatives are readily imaginable. For instance, in line with the practice in approximately nine states and the recommendation of the ABA Commission on Multijurisdictional Practice, North Carolina might simply require that experienced out-of-state lawyers have practiced for a specified period *in any jurisdiction(s)* in which they are admitted (rather than, as North Carolina now does, in a particular jurisdiction). Better yet, North Carolina could dispense with any such place-of-practice requirement altogether and accept that an experienced lawyer who has been practicing anywhere else for years without any problems or complaints is competent to be admitted to its bar. Of course, the Court need not pass upon the constitutionality of such alternatives to grant and ultimately resolve this case. For this purpose, it is sufficient to note that the place-of-practice requirement adopted by respondents is arbitrary and irrational and therefore cannot stand.

B. Commerce Clause.

The petition demonstrates that the North Carolina place-of-admission and place-of-practice provisions violate the Commerce Clause under the decisions of this Court, such as *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976), that strike down state reciprocity statutes. *See also* Ronald D. Rotunda, MODERN CONSTITUTIONAL LAW § 3-3 at 121 (6th ed. 2000) (questioning bar reciprocity arrangements after *Great Atlantic*); Jonathan B. Chase, *Does Professional Licensing Conditioned Upon Mutual Reciprocity Violate the Commerce Clause?*, 10 VT. L. REV. 223 (1985).[4]

4. This Court has noted that the Commerce Clause was derived from the same provision of the Articles of Confederation, and serves the like purpose of "creat[ing] a national economic union," as the Privileges and Immunities Clause at issue in *Piper*, *Friedman*, and *Barnard*, and that the two clauses have a '"mutually reinforcing relationship.'" *Piper*, 470 U.S. at 278-80 & n.8.

In addition, these provisions also violate the cardinal Commerce Clause principle that states cannot adopt protectionist measures that advantage in-state interests at the expense of those out-of-state. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Maine v. Taylor*, 477 U.S. 131 (1986).

Under this Court's Commerce Clause precedents, different standards of review apply depending upon the type of state measure at issue. Given that the North Carolina place-of-admission and place-of-practice requirements expressly discriminate between in-state and out-of-state attorneys, there is a substantial argument that heightened scrutiny should obtain here. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("where simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected"). But in any event, the North Carolina provisions fail to pass constitutional muster even under the less stringent standard because they do not serve the legitimate state purpose of attorney competence and arbitrarily, irrationally, and unnecessarily burden out-of-state lawyers.

1. *Place-of-admission requirement.* At first glance, reciprocity in general, by allowing lawyers more easily to enter other states' bars, appears to enhance rather than obstruct interstate law practice and movement by attorneys. However, that rationale does not justify the place-of-admission requirement imposed by North Carolina. *See* Perlman at 149 ("Protectionism is also apparent in the twenty-one jurisdictions that limit admission on motion to lawyers 'from jurisdictions also offering admission on motion.' . . . The primary explanation . . . is to promote the economic interests of the in-state bar") (citation omitted).

First, the North Carolina place-of-admission requirement is avowedly designed to benefit in-state lawyers. By respondents' own admission, the root purpose is to induce other states to admit without examination North Carolina lawyers to their bars

precisely in order to benefit those in-state lawyers. That, however, is irrelevant to the legitimate state interest of ensuring that out-of-state lawyers reciprocally admitted to the North Carolina bar are competent and fit to practice law in the State. Once it is seen that the place-of-admission requirement does not serve that interest, all that remains is the naked protectionist purpose to provide a benefit for North Carolina lawyers engaged in interstate law practice.

In addition, that rationale in no way supports respondents' approach to allow admission without examination to lawyers in only some states rather than all — and indeed in only those states that elect to grant reciprocal admissions to North Carolina lawyers. Once again, that is entirely unrelated to attorney competence and fitness and reveals that North Carolina simply is seeking an economic benefit for its lawyers.

Finally, these vices in the North Carolina place-of-admission requirement easily could be cured, *e.g.*, by allowing experienced attorneys admitted in any other jurisdiction to move for admission without examination in North Carolina. *See* pages 15-16, *supra.*

2. *Place-of-practice requirement.* North Carolina's place-of-practice requirement is facially protectionist. By admitting only those out-of-state lawyers who meet the arbitrary prerequisite that they have actively practiced for four of the last six years in the particular reciprocity state, and thus by excluding other attorneys like petitioner who have demonstrated competence and fitness in the legal profession by their many years of practice in other jurisdictions, North Carolina serves to protect their own in-state bar members against competition from out-of-state lawyers. Furthermore, alternatives exist that would allow North Carolina to ensure the competence and fitness of the out-of-state attorneys it admits without examination and, at the same time, would not disadvantage those attorneys in order to benefit North Carolina lawyers. *See* page 17, *supra.*

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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